SUPREME COURT, U.S.
FILED

961819 APR 28 1997

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No. 96-

In The
Supreme Court of the United States
October Term, 1996

JOHN DOE,

Petitioner,

IN RE: CARE AND PROTECTION OF MINOR CHILD.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME JUDICIAL
COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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April 28, 1997

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

16 pp

QUESTIONS PRESENTED

1. Given the petitioner's sincere theistic belief that homosexual activity and cohabitation violate fundamental Catholic teachings in relation to the sacrament of marriage, living in the state of grace and familial life, does placement of the petitioner's fourteen (14) year old boy by the Massachusetts Department of Social Services into a foster home with two male homosexual foster parents violate the petitioner's First and Fourteenth Amendment respective rights to freedom of religious belief and to guide in the religious future and education of his child.

2. Whether the Massachusetts Supreme Judicial Court erred in ordering the instant matter dismissed as moot.

LIST OF PARTIES

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FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

The petitioner, John Doe, respectfully prays that a writ of certiorari issue to review the order of the Supreme Judicial Court, Commonwealth of Massachusetts, entered in the above entitled proceeding on January 28, 1997.

OPINIONS BELOW

Concerning the Care and Protection Proceedings here of consequence, filed pursuant to M.G.L. c. 119, § 24 by the Massachusetts Department of Social Services ("DSS" or "the

Department"), Judge Tyre of the District Court Department, Middlesex County, Cambridge Division, Commonwealth of Massachusetts, denied the petitioner's October 9, 1996 motion, seeking to remove his minor child from the foster home of two male homosexuals. This interlocutory order was entered on October 15, 1996, without written opinion. *See* Appendix (hereinafter App.) 1a. Subsequent thereto, on October 23, 1996, the petitioner filed a written motion for reconsideration of the same, which motion was denied on November 25, 1996, without written opinion. *See* App. 1a.

The petitioner, in response to said interlocutory order, submitted a Petition for Extraordinary Judicial Relief to the Single Justice of the Supreme Judicial Court, Commonwealth of Massachusetts, pursuant to M.G.L. c. 211, § 3. After argument by counsel for the parties, the Single Justice denied the petition. Said order was entered on November 7, 1996, without a written opinion. *See* App. 2a.

Petitioner appealed the order of the Single Justice to the Full Court of the Supreme Judicial Court, Commonwealth of Massachusetts. A Motion to Deny Appeal and Dismiss Complaint was filed because the underlying Petition had been dismissed and the subject child had been returned to his parents' custody. As is standard appellate practice, said motion was reviewed by the Single Justice of the Supreme Judicial Court. The Single Justice recommended that the Motion to Dismiss be allowed, and the appeal be dismissed as moot. The Full Court issued an order adopting the recommendation of the Single Justice on January 28, 1997, without oral argument or the issuance of a written opinion. *See* App. 3a.

STATEMENT OF JURISDICTION

Petitioner was the respondent father in a care and protection action filed by the Department in the District Court Department, Cambridge Division, Middlesex County, Commonwealth of Massachusetts, pursuant to M.G.L. c. 119, § 24. An interlocutory order denying the petitioner's motion to remove the child from his then current foster care placement was issued by Judge Tyre of the District Court Department, Cambridge Division, Middlesex County, Commonwealth of Massachusetts. Said decision violates the petitioner's First and Fourteenth Amendment rights to freedom of religion and related liberty interests. Said interlocutory order, which was appealed by the petitioner to the Massachusetts court of last resort and subsequently dismissed as moot, is inconsistent with relevant decisions of this Court, namely *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

The jurisdiction of the Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment:

Religious and Political Freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

Fourteenth Amendment:

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In this case, the Department, after acquiring custody of the fourteen year old boy pursuant to M.G.L. c. 119, § 24, placed him into the foster home of two male homosexuals. In so doing, the Department failed to inform the petitioner or the petitioner's wife (child's mother) about the foster parents' sexual orientation. The petitioner filed a motion with the Court during an ongoing "seventy-two hour hearing"[1], claiming, *inter alia*, that the said foster care placement violates the petitioner's religious beliefs and familial liberty interests, as such are embodied within the First and Fourteenth Amendments.

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[1] Pursuant to M.G.L. c. 119, § 24, due to the need for expedition in this type of proceeding, on the petition of any person alleging neglect or abuse, a court may transfer custody of a child to the Department, *ex parte*, on a showing of reasonable cause. However, prior to the expiration of 72 hours, the Court must determine by a fair preponderance of the evidence whether the transfer of custody should continue until the (third) hearing on the merits. *Care and Protection of Robert*, 408 Mass. 52, 68 (1990). Unfortunately, but not surprisingly, the so called "seventy-two hour hearing" here of consequence continued on for more than three months before the Department acknowledged that they had no evidence to present at trial, and thus, returned the child to his parents.

REASONS FOR GRANTING THE WRIT

1. On the merits, the threshold question in this case is whether the Department's placement of the boy with two male homosexual partners violates the petitioner's First and Fourteenth Amendment rights.

In *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-16 (1972), involving members of the Old Order Amish and Conservative Amish Mennonite faith who claimed that state compulsory education laws, as applied to them, violated their right to free exercise of religion, the Court held that the Amish claim was religious because it was "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. *Id.*, at 216.

In *Yoder*, the central theme which runs throughout the decision is that the state does not have the right to place Amish youth of an impressionable fourteen years of age into a school environment of worldly secular influences inconsistent with the fundamental tenets and practice of the Amish faith. *Yoder*, 406 U.S. at 216. In this case, the petitioner respectfully asserts that DSS does not have the right to place a Catholic youth of an impressionable fourteen years of age into an environment of secular family influences which by their very nature and constitution are wholly inconsistent with the tenets and practice of the Catholic faith.

The petitioner offers no argument in relation to the correctness of utilizing gay or lesbian persons as foster parents. The only impediment which the petitioner seeks to impose on the state's compelling interest in protecting its youth is that, in state intervention matters requiring foster care, the Department must not place a Catholic minor child into a foster home which, by its very nature, composition and

appearance, violates the bedrock, fundamental religious beliefs of the Catholic faith.

2. Petitioner maintains that a ripe controversy exists and that the appeal should not have been dismissed as moot. Although the child has since been returned home and the Department is not presently violating the petitioner's constitutional rights, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot". *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1952). The foster care placements here at issue often involve short-term stays which by operation of temporal constraints evade appellate review. Furthermore, the Department possesses the unilateral ability (*See, Care and Protection of Isaac,* 419 Mass. 602, 614 (1995)) and motivation to avoid appellate review in long term placements by simply altering any questionable placement prior to review. The Department is motivated to do this because such practice helps to alleviate their foster home shortage problems. As such, the Department has the ability to continuously evade review of this issue.

This issue, which is unlikely to be subject to appellate review in the normal course before it becomes moot, coupled with the public interest in having the legality of the Department's practices settled, militates against a mootness conclusion and is therefore appropriate for review by the United States Supreme Court. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1952).

CONCLUSION

Based on the foregoing, the petitioner respectfully submits that this petition for certiorari should be granted

because the issues presented are ripe for, and worthy of, this Honorable Court's review.

Respectfully submitted,

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APPENDIX A.

No written or oral opinion accompanied the Trial Court's October 15, 1996 decision to deny the petitioner's motion to remove the minor child from his then current foster care placement. See Trial Docket Entry No. 13, annexed to the underlying pleadings.

No written or oral opinion accompanied the Trial Court's November 25, 1996 decision to deny the petitioner's motion to reconsider its earlier decision referenced directly above. See Trial Docket Entry No. 23(A), annexed to the underlying pleadings.

APPENDIX B.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-96-0566

IN RE: CARE AND PROTECTION

JUDGMENT

This matter came before the Court, O'Connor, J., presiding, on a petition pursuant to G.L. c. 211, s. 3. There was argument by counsel for the parties and upon consideration thereof, it is ORDERED that the petition be, and the same hereby is, denied.

By the Court (O'Connor, J.)

/s/ Maura Doyle
Maura S. Doyle, Clerk

Entered: November 7, 1996

APPENDIX C.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT

NO. SJC-07358

IN RE: CARE AND PROTECTION

ORDER

The Full Court has adopted the recommendation of the Single Justice, and therefore, it is ORDERED that the Motion to Dismiss filed on behalf of the Child be and it is hereby allowed and it is further ORDERED that this appeal be, and it is hereby, dismissed as moot.

It is, therefore, not necessary to take action on the motion of the father to expand the record.

By the Court,

/s/ Jean M. Kennett
Clerk

Entered: January 28, 1997